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ALEXANDER
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No. 80-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PADUCAH ASSOCIATES, LTD.,
Petitioner,

vs.

INDIANA INSURANCE COMPANY
and
ALL PRIDE DEVELOPMENT CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

Introduction

The Petitioner's Statement of the Case contains two major inaccuracies which affect the Petitioner's whole argument. These two inaccuracies will first be set forth and then Respondent will make a brief comment as to a third possibly misleading matter in Petitioner's Statement of the Case.

Petitioner Never Asserted a Slander or Disparagement of Title Claim in or Prior to the Arbitration Proceedings

At page 4 of its petition, Petitioner states that its second amended complaint in the District Court for the Western

District of Kentucky stated a claim for disparagement of its title, hindering its ability to obtain financing. This is not correct. Petitioner did not assert a claim for slander or disparagement of title until after the conclusion of the arbitration proceedings. See page A-7 of Petitioner's Appendix B, the Opinion of the District Court for the Western District of Kentucky. This fact is most significant because it was Petitioner's failure to either assert or submit a claim of slander or disparagement of title before the arbitrators that controlled the decision of the district court and the Court of Appeals. In its order, the Court of Appeals stated:

> "Paducah did not pursue its slander of title claim before the arbitration panel. The district court granted summary judgment, finding that Paducah had waived its slander claim by *failing to pursue its claim at arbitration.*" (Petitioner's Appendix page A-1) (Emphasis supplied.)

The District Court for the Western District of Kentucky stated in its opinion at page A-5 of Petitioner's Appendix:

> "Despite an earlier ambiguity on this point, the parties now agree that the slander-of-title claim was never submitted to the arbitrators for decision."

Since the parties had stipulated that all claims, including those pending in the District Court for the Western District of Kentucky, were submitted to arbitration, the fact that no slander of title claim was pending in that district court or elsewhere, was the basis of the decision of the District Court for the Western District of Kentucky and the Court of Appeals to the effect that Petitioner waived such claim by not submitting it to the arbitrators.

The District Court for the Southern District of Ohio Was Never Requested to Nor Never Ruled that Petitioner's Slander or Disparagement of Title Claim Was Barred or Not Barred

At page 6 of its petition, Petitioner under the heading Confirmation of the Arbitration Award, misstates the nature of

the counterclaim Respondent filed in the District Court for the Southern District of Ohio in the confirmation proceedings when it states that Respondent sought to have that court modify the award to bar Petitioner from later claiming damages for slander of title. As is shown at page A-21 of Petitioner's Appendix (Opinion of the District Court for the Southern District of Ohio), Respondent did not assert such claim. All Respondent sought was a clarification with respect to the stipulation that all claims had been submitted. At page A-23 of Petitioner's Appendix, the district court said:

> "The Court concludes that, on the present record, there is no evidence that the slander of title issue was presented to the arbitration panel, or that they considered it. The record demonstrates that just the opposite occurred. Given that undisputed state of facts, the defendant cannot successfully maintain that the arbitration award ¶ 7 is manifestly in disregard of the law or that it lacks fundamental rationality."

The district court then refused to make the requested modification because the language in the award was not in manifest disregard of law. That district court did not as Petitioner states, make an adjudication with respect to the question of whether the failure to submit the slander of title claim either barred or did not bar Petitioner's assertion of that claim in another forum at another time. Moreover, it was not appropriate for that issue to be raised in the confirmation proceedings or for that district court to consider such a question if it had been raised. All that district court did was confirm the language of the arbitration award.

The Reason the District Court for the Western District of Kentucky Reversed Itself on the Question of Whether There Was a Material Issue of Fact

At page 7 of its petition under the heading Proceedings Subsequent to Confirmation, Petitioner states that the District Court for the Western District of Kentucky initially denied the

motion for summary judgment because there was a genuine issue of material fact but later reversed that decision. This is true but as the district court said in its opinion granting the motion for summary judgment and shown at page A-5 of Petitioner's Appendix:

> "Despite an earlier ambiguity on this point, the parties now agree that the slander-of-title claim was never submitted to the arbitrators for decision."

SUMMARY OF ARGUMENT

Once the inaccuracies in Petitioner's Statement of the Case are noted, it becomes apparent that Petitioner had agreed to submit all claims it had against Respondent to arbitration. It did not submit any claim based on the theory of slander or disparagement of title. The arbitrators in their award noted that such a claim was not submitted, and therefore they said they were not deciding such a claim. The District Court for the Southern District of Ohio confirmed the award stating that it agreed that Petitioner had not submitted any claim based upon slander of title. When Petitioner brought its action for slander or disparagement of title in the District Court for the Western District of Kentucky, that court held that Petitioner's failure to assert such claim before the arbitrators constituted a waiver of that claim. Once these facts are established, it is apparent that the issues Petitioner seeks to raise do not even exist yet alone constitute a ground for the granting of certiorari.

THERE IS NO REASON FOR THE GRANTING OF THE WRIT

I. There Is No Conflict Between the Decisions of the Circuit Courts of Appeal

The cases of *Reid Burton Construction, Inc.* v. *Carpenters District Council of Southern Colorado*, 614 F. 2d 698 (10th Cir.

1980) and *Burton-Dixie Corporation* v. *Timothy McCarthy Construction Co., Inc.*, 436 F. 2d 405 (5th Cir. 1971) both involve actions where the plaintiff had filed a complaint in the district court seeking relief when, under a contract, the plaintiff had agreed to arbitrate such dispute. In both cases the defendant did not raise the arbitration agreement as a defense in a clear and timely manner. In both cases, the court held that the evidence of such a failure to raise the arbitration agreement as a defense in a timely and clear manner justified a finding of waiver of that defense by the defendant. Those cases not only do not have the same issue as in this case before the Court of Appeals for the Sixth Circuit, but they in no way conflict with its decision. The Court of Appeals held that Petitioner's admitted failure to submit its claim for slander of title to the arbitrators under an agreement to arbitrate all disputes, constituted a waiver of that claim so that it could not later be asserted.

Lundgren v. *Freeman*, 307 F. 2d 104 (9th Cir. 1962) did hold, as Petitioner states, that the arbitrators might reserve questions to be decided by a court. In that case, as here, the parties agreed to submit all claims to arbitration. They did so but in the award, the arbitrators stated that they were not deciding certain claims submitted to them because they involved questions of law which they did not feel competent to decide. In the present case, the arbitrators stated that they were not considering slander or disparagement of title because it had not been submitted to them. That is entirely different from the reservation in *Lundgren* of claims actually submitted. Moreover, in *Lundgren*, Lundgren sought additional damages from the district court which the arbitrators had not awarded to him. The court in *Lundgren* held that he had waived such claim for additional damage because he had not submitted a claim for such damage to the arbitrators. Lundgren had agreed to submit all issues between the parties to arbitration. However, he did not make any claim for loss of reputation or loss of credit

in the arbitration proceedings. Under those circumstances, the court ruled that the arbitration award barred Lundgren bringing a subsequent suit for those damages, saying at p. 115:

> "The short answer to this contention [that he had sustained special damages such as loss of reputation, loss of credit standing which were not covered in the arbitration proceedings because of the arbitrators' reservation] is that Lundgren never claimed such damages in his complaint against the school district."

That is exactly what happened in the present case. Petitioner never submitted a claim on the theory of slander or disparagement of title to the arbitrators. Therefore, not only is *Lundgren* not in conflict with the decision in the instant case, it is in accord with the present decision and was a basis of the decision of the district court (Petitioner's Appendix page A-8).

II. There Is No Question Regarding the Federal Arbitration Code

Petitioner contends that the district court should not have dismissed the action but should only have stayed the proceedings and ordered the parties to submit the question of whether or not Petitioner's claim was barred by the prior arbitration award to a new arbitration proceeding. It is well settled that the filing of a complaint in court on a claim covered by an arbitration agreement waives that party's right to arbitrate. *Galion Iron Works & Mfg. Co.* v. *J. D. Adams Mfg. Co.*, 128 F. 2d 411 (7th Cir. 1942). By filing and pursuing its supplemental complaint, Petitioner waived its right to have any of the issues then pending in the District Court for the Western District of Kentucky submitted to arbitration. This was agreeable to Respondent since there was no issue of fact involved and the present issues of law were better decided by a court than by arbitrators. Therefore, both Petitioner and Respondent consented to the present issue being decided by the district

court. *Reid Burton Construction, Inc.* v. *Carpenters District Council of Southern Colorado, supra,* and *Burton-Dixie Corporation* v. *Timothy McCarthy Construction Co., Inc., supra.*

III. The District Court Has in No Way Parted from the Accepted and Usual Course of Judicial Proceedings

Respondent by pointing out the errors in Petitioner's Statement of the Case has shown that these alleged issues just do not exist.

First, the lower court did not permit the entry of summary judgment when genuine issues of material fact existed. The only material fact was whether Petitioner submitted any claim for slander or disparagement of title to the arbitrators. As the record shows, there is no question but that Petitioner did not submit a claim on such a theory.

Second, the record does not support Petitioner's contention that Respondent agreed that the slander of title issue should be withheld. Respondent did acquiesce in the arbitrators' award not deciding that issue, because in fact that issue had not been submitted to them. Respondent did not litigate before the District Court for the Southern District of Ohio the effect of Petitioner's failure to submit that issue, nor was that the appropriate forum to decide such an issue. Moreover, since it was Petitioner's claim and not the Respondent's claim, Respondent could not bring it before the arbitrators. *Lane-Tahoe, Inc.* v. *Kindred Construction Co.* (Nev. 1975), 536 P. 2d 491. *United States for the Use and Benefit of Bay State York Co., Inc.* v. *Seaward Construction Co., Inc.,* 298 F. Supp. 1356 (D. C. N. H. 1969).

Thus, the Statement of the Case as corrected shows that the contentions urged by the Petitioner are not present.

CONCLUSION

A correct Statement of the Case establishes that there is no reason for this Court to grant certiorari. Arbitration like litigation must come to an end. When a party is in court, he is obligated to bring before the court all of his claims arising out of that transaction. When a party has agreed to arbitrate all of his disputes, he is obligated to bring whatever claims he might have before the arbitrators. The district court and the Court of Appeals merely applied the recognized rules of judicial economy in holding that Petitioner waived its claims predicated upon slander of title when it did not afford itself of the opportunity of presenting that claim along with its other claims to the arbitrators.

The petition should be denied.

Respectfully submitted.

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